72-33

Supreme Court, U. S.
FILED
JUL 6 1972
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1972

No. 72-

CALVIN WILLIAMS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1972
No. 72-

CALVIN WILLIAMS,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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Statement

Petitioner, Calvin Williams, respectfully asks this Court to issue a Writ of Certiorari to the United States Court of Appeals for the Second Circuit to review the order of that Court rendered the 15th day of May, 1972, which affirmed the judgment of the United States District Court for the Southern District of New York, convicting him of one count of conspiracy to violate 26 U.S.C. §4705(a), after trial before Palmieri, D.J. and a

jury. The petitioner was sentenced to a term of 8 years imprisonment, although he was never previously convicted of a drug violation.

Opinion Below

The Court of Appeals rendered no opinion in affirming the judgment of conviction.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The Court of Appeals for the Second Circuit denied a petition for rehearing on June 12, 1972, and had affirmed the judgment of conviction on May 15, 1972. Copies of the aforesaid orders are annexed.

Questions Presented

1. Whether a single person can be convicted of a conspiracy violation where the two other co-conspirators on trial have been acquitted?

2. Whether the failure of the Government to either prove or offer to prove the statutory prerequisite that "no order form" had been obtained in this narcotics transaction precluded a conviction and violated petitioner's constitutional rights to due process of law (26 U.S.C. §4705(a))?

3. Whether the name of the alleged purchaser of narcotics should have been included in the count of the indictment referring thereto and whether the Government's failure to disclose the buyer's name

violated petitioner's rights under the due process clause of the Fifth Amendment?

4. Whether the Court should have required the Government to affirmatively prove petitioner's voice identification after a defense expert opined that a voice on a wiretap was probably not that of the petitioner?

5. Whether the Courts below erred in holding that substantive evidence of drugs pertaining only to the substantive counts of the indictment could properly be admitted into evidence against petitioner although he was listed and charged only as a co-conspirator in the first count of the indictment?

Constitutional and Statutory Provisions Involved

The Fourth, Fifth, and Sixth Amendments of the United States Constitution, as well as 26 U.S.C. §4705(a); 18 U.S.C. §371 and Rule 7(c) F.R. Crim.P., are involved herein.

Statement of the Case

The facts herein are singular since the petitioner was named as a co-conspirator in one count of a four count indictment. He was not named as an aider and abettor in the other three substantive counts. Therefore, his status depended exclusively upon his role as an alleged co-conspirator in the first count of the indictment.

Although Williams was only named in the conspiracy count, the Trial Court permitted evidence of drugs to be introduced against the petitioner over his objection.

The co-defendants tried with the petitioner were two females, namely Connie McNeil and Lolita Kowlessar. There were two other defendants named, to wit, Robert Roseboro and Richard English, both of whom were not tried and the Trial Court directed the jury not to consider the guilt or innocence of English and Roseboro in their deliberations. Under that instruction, the Court nevertheless permitted the jury to return a verdict of guilty of conspiracy as against Williams alone, despite the fact that McNeil and Kowlessar were acquitted.

It appeared that Robert Roseboro had pleaded guilty before trial to conspiracy and a substantive count, but that fact was withheld from the veniremen. Richard English, another named co-defendant, has never been tried.

The jury was not told about Roseboro's plea, and in fact were instructed to ignore and not even consider the guilt or innocence of either Roseboro or English in their deliberations.

It is submitted therefore, that the talisman apparently ignored the trial judge's instructions and decided to convict Williams of conspiring with himself— an impossible result under the statutes. On the one hand, the Court told the jury to pay no attention to Roseboro or English, so far as their

deliberations of guilt or innocence were concerned, but on the other hand, the District Judge in essence charged that Roseboro and English, neither of whom were involved as defendants at trial, had formed a conspiracy with respect to the charges of the indictment.

The existence or non-existence of a conspiracy was for the veniremen to decide, not for the Court. Thus on both aspects of the case, the verdict is defective.

The Court was uneasy and apparently unfamiliar with this sort of indictment, despite its experience in other types of cases.

> "This is an unusual type of narcotics case. I have never had one quite like it before because it is a conspiracy to violate the order form statute . . . I have always had the other cases tried under the Food and Drug violations but never under the Internal Revenue Code" (756R, emphasis supplied.).

The irony of the case is that the Government never proved that the order forms had not in fact been employed. Thus there was a fatal flaw in their case.

The trial Court was therefore involved in a case of first impression, so far as it was concerned and this uneasiness is further manifested by the District Judge's prognostication that he was falling into error because of the lack of preparation of the assistant in charge of the prosecution:

> "The Court: Between last Tuesday and today couldn't you have edited those charges so that they would be appropriate to the case in its proper posture. It is giving me a lot of clerical work I shouldn't have (to do). These pre-prepared charges . . . that refer to a case in a different posture, can well lead a judge into error in making a charge." (730R, emphasis supplied.)

Another error which mandated reversal was the omission to offer positive proof of the voice of Williams after the defense adduced expert evidence casting serious doubt on the identity of the voice, allegedly that of Williams, on a tape recording.

A wiretap on Mr. Roseboro's telephone from November 23, 1970, to obtain information as to Roseboro's customers and suppliers produced many tapes of recorded calls. Some of these tapes and transcripts thereof, stipulated as accurate, were introduced to support the testimony as to the said sales and to involve the remaining defendants in the alleged conspiracy. Two (2) defendants, Connie McNeill and Lolita Kowlessar were found not guilty after trial. The remaining defendant, Calvin Williams, the petitioner herein, was found guilty.

The evidence against petitioner consisted of testimony as to three (3) (166, 176, 200R) brief meetings with Roseboro and/or English in or near a certain bar on December 6, 7, 10, 1970, and on certain recorded telephone conversations of

calls made by Roseboro to the said bar allegedly to the petitioner (Tape in Evidence, 3J4, 3K4, 3L4, 3N4, 3Q6, 3R4, 3R5).

The government offered no testimony as to the substance of any of the conversations at the said brief meetings. A surveilling agent did say that he saw petitioner talk on the phone in the said bar on December 11, 1970, but the Government concedes that these calls could not be connected with any calls monitored from Roseboro's phone (515R). Nevertheless, this testimony was left in the record over objection.

The telephone calls (Government exhibit, 3J4, 3K4, 3L4, 3N5, 3Q6, 3R4) alleged to be from Roseboro to the petitioner are to a "Calvin" at the said bar. The tapes contain no direct statements as to narcotics generally or to the sales herein involved. Certain allegedly equivocal words, such as "whiskey," "wine," "dress too small," "quarter," "dime" and several more, (278, 279, 284R) were interpreted by an agent as referring to narcotics (278-279R). However, in a tape introduced by the defense (Tapes in Evidence 3N3), similar words were interpreted as non-narcotic in import (366-369R). The test, according to the witness was his own knowledge of the alleged involvement of the speaker in narcotics (278-284R). In effect the agent was allowed to render an opinion as to the defendant's innocence or guilt.

Statement of the Case

The government relies, for voice identification, solely on the admittedly circumstantial evidence (175R) of Roseboro trying to arrange a meeting with the "Calvin" on the phone. This "Calvin" refused (Tape, Exhibit 2). Later that night Roseboro met the petitioner at the said bar.

The defense qualified a voice identification expert who testified as to his techniques and to his opinion that he had substantial doubt that the voice of the "Calvin" on the tape was that of Calvin Williams, the petitioner herein (581R). There was no rebuttal voice identification testimony. The court refused defendant's request to charge concerning the government's right to examine the voice of Calvin Williams and the inferences to be drawn therefore (752-754R).

Argument

Point I

THE PETITIONER AND TWO FEMALE CO-DEFENDANTS WERE THE ONLY PERSONS ON TRIAL AND AGAINST WHOM THE JURY WAS PERMITTED TO CONSIDER THE ISSUES OF GUILT OR INNOCENCE OF CONSPIRACY. SINCE THE FEMALE CO-DEFENDANTS WERE ACQUITTED, NO CONVICTION WAS POSSIBLE AGAINST WILLIAMS. THE VERDICT WAS THEREFORE IMPOSSIBLE.

The court below made it crystal clear that the jurors could consider the guilt or innocence of only the three persons on trial. It forbade the jury to

consider Roseboro or English. Moreover, it refused to divulge to the veniremen, that Roseboro had pleaded guilty prior to trial.

Williams was not involved in any but the conspiracy charge. He was not even accused as an aider or abettor in the other counts under Title 18 U.S.C., Section 2.

In United States v. Masiello, 445 F.2d 1324, the Court had a similar situation where a number of persons were named in a conspiracy, but only three were on trial (both Masiellos, and ANR Leasing Corp.). The district court had held that at least two of the defendants on trial had to be found guilty in order to bring in a conviction on the conspiracy count. The court affirmed despite the fact that the appellants argued that the conspiracy could have existed among other co-conspirators not on trial.

The case at bar is an a fortiori case, since the Court below removed the other alleged conspirators, Roseboro and English from the consideration of the jury. Since the govenment raised no objection or protest, this became the law of the case.

The trial judge exacerbated the error by removing the issue of "conspiracy" from the jury when it charged that there was a conspiracy between Roseboro and English, neither of whom were on trial, and that the issue was whether the defendants on trial were co-conspirators of English and Roseboro.

> ". . . it is a case in which these three defendants are being charged with having been co-conspirators of Roseboro and English, and the big question in the case is whether they were" (785-6R).

Please note that the court foreclosed the possibility of finding that no conspiracy ever existed. This all important element, the very core of the case, was removed from their consideration for all intents and purposes.

Perhaps the foregoing instruction would have made some sense if both Roseboro and English had been found guilty. But the fact is that only Roseboro had pleaded and English had and still has not been tried. Certainly Roseboro could not be a one man conspiracy.

In addition, the indictment charged that the defendants "conspired . . . together and with each other . . ." (emphasis supplied), but yet the trial court precluded the possibility of the three defendants on trial being guilty of any conspiracy unless they did so with both Roseboro and English (emphasis supplied, the conjunctive requiring both).

The vice of the charge is that the jury was no longer judging whether a conspiracy existed in the first place, but whether Williams was a part of an existing conspiracy.

The indictment did not charge that the three on trial of necessity had to have been conspiring

with Roseboro and English to be found guilty, but that there may have been a conspiracy among any two charged therein.

Since the jury was told that they should not consider the guilt or innocence of English and Roseboro, they were in essence being told that they must consider those two already guilty — otherwise the charge necessarily would have to have been grounded on the issue of whether any conspiracy in fact existed among any of the defendants; if it did, then who were the members thereof; and finally, was anyone guilty of a crime?

English was and is entitled to a presumption of innocence. Since the jurors were told they could not consider his or Roseboro's guilt or innocence, then it was plain error to have charged that they were conspirators as a matter of law.

Where a single defendant stands convicted of a conspiracy, the verdict is contrary to law (United States v. Suba, 227 F. Supp. 445); see also, United States v. Hysohian, 448 F.2d 343; United States v. Austin-Bagley Corp., 31 F.2d 229; Kitchell v. United States, 354 F.2d 715, and Cobb v. United States (Second Circuit, 1972), F.2d , Docket No. 32148, are distinguishable.

It must be borne in mind that "persons unknown" were not submitted as possible conspirators to the jury (Grove v. United States, 3 F.2d 965; Didenti v. United States, 8 F.2d 318), and Roseboro and English were removed from the issue of guilt or innocence, so only the three on trial

were left for consideration — two having been acquitted, there was no basis for the conviction of Williams.

In Masiello, supra, there were other self-confessed conspirators not on trial, but this Court held that two of the three actually on trial had to be found guilty to sustain a conspiracy.

By statute (Title 18, U.S.C. §371) and by the case law, (Krulewitch v. United States, 336 U.S. 440, 445-448) not less than two persons may form a conspiracy. The Court however, charged that the conspiracy already must be presumed to have existed between English and Roseboro. Those two therefore were presumed to be guilty.

How the veniremen therefore could possibly have obeyed the instruction to consider only the guilt of the three on trial and not the other two is impossible to fathom. The issue was not whether a conspiracy existed, therefore, but whether the three on trial were a part of it. Thus, the main issue in the case was taken from the jury's consideration.

The Court further confused the issue by stating that a conspiracy might exist between the defendants on trial (772R). Since the jury could not consider the guilt or innocence of the defendants not on trial, there could have been no conviction of Williams when the two female co-defendants were acquitted.

In addition, the Court told the jurors that they could not avoid finding that the conspiracy existed between Roseboro and English to deal in narcotics, but went on to assume that this also necessarily meant that the conspiracy included illegal dealing in narcotics, not pursuant to the written order to purchase (779R).

The net effect of the charge of conspiracy was that the jury had no right to convict Williams once they decided to acquit the females and the Court below should have so instructed them. Moreover, the motions to set aside the verdicts should have been granted.

Point II

THE INDICTMENT NAMED THE PETITIONER ONLY IN THE CONSPIRACY COUNT AND DID NOT INCLUDE HIM, EVEN AS AN AIDER AND ABETTOR IN THE SUBSTANTIVE CHARGES. MOREOVER, IT WAS TOTALLY DEFICIENT IN APPRISING THE APPELLANT OF THE CHARGES AGAINST HIM AND INCLUDED PERIODS OF TIME THAT ANTEDATED AND POST-DATED THE CONSPIRACY. THE TRIAL COURT ACKNOWLEDGED THAT IT WAS UNFAMILIAR WITH THIS TYPE OF INDICTMENT ("ORDER FORM") AND HAD NEVER TRIED A CASE UNDER THE STATUTE THEREIN EMPLOYED.

In discussing the "order form," we have already explained why the Court below erred in failing to charge the jury that they must find that the government proved that no order form

had been used. (See United States v. Vuitch, 402 U.S. 62). We therefore only wish to point out that the Court assumed that the language of the true bill requiring and referring to the "order form" was surplusage. As discussed elsewhere in this brief, the allegations with respect to the order forms had to be pleaded and proved. No evidence as to the order form was introduced.

The indictment itself was obviously a catch-all, scattergun approach which had no relation to the facts to be proved at trial. At trial, the evidence only referred to events between September and December, 1970, yet the indictment said the conspiracy was between January 1970 and April 1971. Since the arrests were in February, 1971, it is obvious that no conspiracy could have persevered beyond February.

This is therefore a blatant prostitution of Costello v. United States, 350 U.S. 350. This necessarily confounded and confused the appellant and caused him to seek a defense for a period not remotely connected with most of the proof to be offered at trial (United States v. Arcuri, 405 F.2d 691.

The purpose of an indictment is to inform the accused of "the nature and cause of the accusation". (Sixth Amendment, Rule 7(c) F.R.Criminal Procedure; Russell v. United States, 369 U.S. 763-4; United States v. Lamont, 236 F.2d 312; accord: United States v. Debrow, 346 U.S. 374).

The indictment therefore was fatally vague (United States v. Agone, 302 F.2d 1258).

Argument

It is to be noted that the indictment charged a conspiracy ranging from January 1, 1970 through April 1, 1971, although the period covered by the testimony referred only to September 1970 through December 1970 (292R). The Court therefore permitted the jury to consider conspiratorial conduct for a period of two months after the arrests took place in this case, which was in February 1971. We maintain that this was a fatal variance and not merely a de minimis or technical mistake.

Point III

THE COURTS BELOW IN ESSENCE HELD THAT THE OMISSION OF THE GOVERNMENT TO PROVE OR EVEN ATTEMPT TO PROVE THAT NO ORDER FORM HAD BEEN OBTAINED OR WAS CONSIDERED BEING OBTAINED IN CONNECTION WITH THE CONSPIRACY HEREIN, WAS A VIOLATION OF THE STATUTE AND ALSO OF PETITIONER'S RIGHTS TO DUE PROCESS OF LAW.

The petitioner maintains that since the statute plainly requires that the Government establish that no order form was obtained in order to establish guilt, the Government failed to prove its case. (26 U.S.C. §4705(a); §4742(a); and §7237(b).

This Court, in United States v. Vuitch, 42 U.S. 62, 91 S.Ct. 1294, held that the negative, if essential to guilt, must be proved by the Government. In other words, if it is necessary that the Government show that no order form was ob-

tained or that the conspiracy did not contemplate getting one, then that negative fact must be proved. There is nothing in the statute which presumes that no order form will be obtained or which shifts the burden of proof to the accused.

The Courts below, in essence, held that the statutory language requiring proof that no order form was involved, was meaningless. But this flies in the fact of Vuitch which announces that in criminal statutes, a negative exception must be pleaded and proved by the government.

Let us assume that instead of laymen, one or more of the defendants had been doctors or dentists. Under the statutes there may be circumstances whereby proper order forms can be obtained and used. To be consistent, this Court and the Court below would have placed the burden of proof on the accused to establish that they had procured the proper order forms, leaving to the government the task only of proving that there was a transaction in narcotics.

Congress alone can declare violations of statutes to be deemed criminal acts. There is no federal "common law crime." Everything is statutory and as such must be strictissimi juris enforced. (United States v. Sabella, 272 F.2d 206, 211(Second Circuit, 1959) dictim; Chin Gum v. United States, 149 F.2d 575, 577 (First Circuit, 1945).

Both Chin Gum and Sabella indicate that congress alone enacts criminal statutes, but are in conflict

with Vuitch in holding that the negative exceptions need not be proved. Vuitch must of necessity be deemed to have overruled this line of cases. But see, United States v. Devereaux, 422 F.2d 862 (Ninth Circuit, 1969) which casts doubt on the proof required in respect to the "order form" even before Vuitch.

It is submitted that the burden of proof in a criminal case never shifts to the accused. The Court however permitted the jury to assume that no order form had been obtained or was ever contemplated being obtained and, moreover, that the Government did not have to prove anything along those lines.

Congressional intent in writing the statute, to say nothing of the clear statutory language, was utterly ignored.

It is respectfully urged that much less is being asked of the prosecution than in marijuana cases where a demand can be made on the defendant for the order form (Alvarez v. United States, 426 F.2d 301) and in the absence of such demand no presumption of guilt may be inferred (United States v. Devereaux, supra).

Petitioner simply argues that the Government is under a duty, as part of its burden of proof, to make some reference to the alleged lack of a proper order form. A simple statement that the Government does not know of such order form could shift the duty of going forward to the defendant.

Argument

Point IV

SINCE THE NAME OF THE BUYER WAS NOT DISCLOSED IN THE INDICTMENT, IT WAS FATALLY DEFECTIVE AND FOR THAT REASON ALONE THE JUDGMENT SHOULD BE REVERSED.

We have already adverted to the fact that no buyer's name was mentioned in the indictment although the demand for a Bill of Particulars submitted by Williams clearly requested that such information be supplied.

While this Court has not yet adopted the ruling of Lauer v. United States, 320 F.2d 187, it is submitted that the cogency of that opinion warrants adoption thereof by this Circuit. In line with the requirements of the Sixth Amendment and Rule 7(c), Federal Rules Criminal Procedure, it is essential that the name of the person to whom the sales are to be made or were made be revealed (Russell v. United States, supra, United States v. Lamont, supra).

It is significant that Lauer was decided under the very statute herein involved.

It is very possible, just to attempt to avoid this type of prosecution, that a buyer will present an order form, invalid perhaps, but correct on its face. A government agent or a doctor, for example, could readily have access to such forms.

An indictment must set forth a specific offense. Using the language of a statute alone would not be sufficient if a defendant is not apprised

fully of the charge (Russell v. United States, 369 U.S. 749, United States v. Simmons, 96 U.S. 360).

As expressed in United States v. Cruikshank, 92 U.S. 542, an indictment in generic terms must state the species, must descend to particulars.

The indictment herein did not name the buyer in the alleged sales of narcotics. The Second Circuit has not followed as yet, the ruling in Lauer v. United States, 320 F.2d 187 and United States v. Ewell, 242 F.2d 451, wherein 4705(a) indictments were held defective for not naming the purchaser.

It is submitted herein that since a demand for a Bill of Particulars was made asking for disclosure of the buyer's name, the reasoning of Lauer v. United States, supra, became all the more compelling. In any event, there was no basis in this case for withholding that name and disclosure would seem to have been required (United States v. Roviaro, 353 U.S. 53, 63, 64 (1957)).

Point V

THE VOICE IDENTIFICATION OF "CALVIN" WAS NOT ONLY UNSATISFACTORY, BUT WAS CONTRADICTED BY A DEFENSE EXPERT. WITHOUT SUCH IDENTIFICATION, THE GOVERNMENT'S CASE IS VIRTUALLY EMASCULATED.

The Court refused to charge that the government was remiss in not obtaining voice exemplars of petitioner. The defense expert, Dr. Louis Gers-

man, opined that he had substantial doubt that the voice on the tapes was Williams'.

The prosecution's evidence was strictly circumstantial and made much of the use of the name "Calvin" which happened to be petitioner's first name, but is also the first and last names of many other persons (175R).

Voice printing or the use of "spectrogram analysis" was recently ruled sufficiently reliable to be admitted into evidence in the District Court of Washington, D.C. (United States v. Raymond, U.S. D.C., D.C. 2/2/72, 10 Cr.L. 2407, 8; Trimble v. Hedman, Minn., 10 Cr.L. 2161, 11/26/71).

Since the Court below refused to make any sort of analysis or to obtain exemplars for such purpose, the requested charge should not only have been granted, but the motions to keep out the evidence should have been granted (754R; 801R).

Here again, the Court in essence placed the burden of persuasion on the defense as it did with "order form" in the statute. Since the government could have produced reliable proof and experts, it was error to have admitted the tapes.

The procedure herein was just about as absurd as introducing "fingerprints" belonging to one "Calvin," but not offering expert testimony that they were the prints of Calvin Williams, the defendant on trial. The Raymond and Trimble cases, coupled with the study of Dr. Oscar Tosi, Professor of Audiology and Speech Sciences at Michigan State University.

Argument

> "It is on the basis of the extensive Tosi study, his testimony in open Court, and the opinions expressed by other experts, that this Court concludes spectrogram analysis is admissible evidence." (Raymond, supra, at 10 Cr.L. 2408).

The Government's own memorandum of law claimed that the agents will identify the voices on the several pertinent tapes, and that it would establish the competency of those who prepared the transcripts to distinguish and identify the voices.

The government did not do so. It only offered testimony that the voice of the "Calvin" talking to Roseboro was the same on all tapes. It did not identify the appellant as the speaker. The Government admits that the several pertinent tapes offer only circumstantial evidence as to identity (48-49R). As an example, a "Calvin" was called by Roseboro. Roseboro attempted to make an appointment. He was turned down by the "Calvin" speaking (Tape Exhibit 3R5). Later, that night Roseboro met the petitioner. Maybe the same Calvin as petitioner, maybe not. The Government admits that without proper voice identification none of the testimony as to the sales is admissible as against this petitioner (175R). It would appear that the government was remiss in not demanding a voice exemplar, as it could do and call in voice identification experts. Was the Government merely remiss or did it believe it had good cause for not so doing? The petitioner should be given the benefit of the doubt. To compound the problem, the Court refused to charge any inference from

this failure to demand an exemplar (754R), because a defendant might not cooperate and attempt to simulate. Consistency demands that if a voice identification expert may qualify, he may also give an opinion as to the defendant's cooperation. An opinion of no cooperation or attempted simulation can be more damaging to a defendant than the yes, no or maybe of the identification proper. In any event, such matters would affect weight and not admissibility. If properly admissible, then the well recognized presumption should be operative and charged.

The petitioner did put on a voice identification expert. This expert's sampling and unfortunate technical jargon (570R, 578-9R) did not impress the jury, because of the Judge's prejudicial charge and refusal to properly include defendant's charge.

It is not for the petitioner to prove that his was not the voice taped. The burden of proof or even the duty to go forward should not shift to a defendant when the Government could so easily produce suitable experts.

The strategy of the Government placed petitioner in an untenable dilemma. To a lay jury, the simplest way of settling voice identification would be for petitioner to say something. Logical, fast and simple! The Court's instructions that the jury may draw no inferences from the defendant's silence were in accord with accepted practice. A Court cannot go into the full history of this rule nor can it educate the jury in all of the lawful reasons as to why a defendant may remain silent.

Argument

There was no need to strain the integrity and human abilities of the jury. The Government could have used an exemplar of petitioner's voice and called suitable experts.

The Court's statement in United States v. Knohl, 379 F.2d 427, should act as a guideline, where the Court stated:

> "We are not unmindful, however, that tape recordings are susceptible to alteration and that they often have a persuasive, sometimes a dramatic, impact on a jury. It is therefore incumbent on the Government to produce clear and convincing evidence of authenticity and accuracy as a foundation for the admission of such recordings; and where the court accepts them as authentic and accurate but the evidence is conflicting on these points, it must caution the jury to scrutinize the evidence with care" (emphasis supplied). See Alerman v. United States, 394 U.S. 165.

Because of the conflict as to voice identity and the acceptance of a federal agent's opinion as to the meaning of certain words, Calvin Williams was denied a fair trial and due process of law.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

IRVING ANOLIK
Attorney for Petitioner

Appendix A - Judgment of Affirmance of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifteenth day of May one thousand nine hundred and seventy-two.

Present:

HON. PAUL R. HAYS
HON. LEONARD P. MOORE
HON. J. JOSEPH SMITH

Circuit Judges.

Appendix A - Judgment of Affirmance of the United States Court of Appeals

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-v-

CALVIN WILLIAMS,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

R. DANIEL FUSARO
Clerk

Appendix B - Order Denying Petition for a Writ of Certiorari

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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United States of America,

Plaintiff-Appellee,

v.

Calvin Williams,

Defendant-Appellant.

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A petition for a rehearing together with a motion in the alternative to stay the issuance of the mandate and to continue bail pending application for a writ of certiorari to the Supreme Court of the United States having been filed herein by counsel for the appellant.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

DENIED

s/ Paul R. Hays
Paul R. Hays

s/ Leonard P. Moore
Leonard P. Moore

Appendix B - Order Denying Petition for a Writ of Certiorari

s/ J. Joseph Smith
J. Joseph Smith

Circuit Judges

June 12, 1972

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-33

CALVIN WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of having conspired to transfer narcotics not pursuant to a written order form, in violation of 26 U.S.C. (1964 ed.) 4705(a) and 7237(b). Petitioner was sentenced to eight years' imprisonment. The court of appeals affirmed without opinion (Pet. App. A).

The evidence showed that petitioner supplied narcotics to one Robert Roseboro, a co-defendent who had pleaded guilty.[1] Narcotics agents purchased $30,000 worth of heroin and cocaine from Roseboro in October and December 1970 (Tr. 65-71, 75-93, 199-202, 239-240, 546). A court-authorized wiretap of Roseboro's telephone disclosed six conversations with an individual who identified himself as "Calvin." The conversations related to the purchase of narcotics; in three of the conversations Roseboro and "Calvin" agreed to meet at a specific time. After each of these conversations, Roseboro or his courier (Richard English) met with petitioner at the time agreed upon in the overheard conversations (Tr. 144-147, 166-174, 176-179, 219-221, 517-520).

1. Petitioner contends that the jury could not convict him of conspiracy to transfer narcotics and at the same time acquit Kowlessar and McNeil, the only co-defendants tried with him. But petitioner was indicted for conspiring with English and Roseboro as well as with Kowlessar and McNeil to transfer narcotics,[2] and the evidence overwhelmingly established that petitioner, Roseboro and English conspired to sell narcotics to a federal agent. Roseboro had already pleaded guilty to the charge; English was a

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[1] Co-defendant Richard English, Roseboro's courier, was a fugitive at the time of trial. Co-defendants Lolita Kowlessar and Connie McNeil were tried with petitioner on the conspiracy charge and were acquitted.

[2] We are lodging a copy of the indictment with the Clerk of this Court.

fugitive at the time of trial. Under these circumstances, the fact that Kowlessar and McNeil were acquitted does not require petitioner's conviction for conspiracy to be set aside. See *United States* v. *Marquez*, 424 F.2d 236, 239-240 (C.A. 2), certiorari denied, 400 U.S. 828.[3] Petitioner's reliance on *United States* v. *Masiello*, 445 F. 2d 1324 (C.A. 2) is misplaced (Pet. 9, 12). Contrary to petitioner's assertion (Pet. 12), there is nothing in the opinion which suggests that two of the three defendants actually on trial have to be found guilty to sustain a conspiracy conviction.

2. Petitioner argues that the indictment was defective because it did not contain the name of the buyer and because the proof at trial showed a conspiracy during October and December 1970, where-

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[3] Petitioner's contention (Pet. 9-10) that the court prevented the jury from finding there was no conspiracy is not borne out by the record. The trial judge never told the jury that a conspiracy existed between Roseboro and English. Rather he told the jury, without objection, that Roseboro and English were involved in a narcotics conspiracy "if you believe the government's evidence" (Tr. 779), "if you accept the government's evidence" (Tr. 885). The judge properly charged the jury to consider each defendant separately and to acquit petitioner unless the jurors first found the existence of a conspiracy and then determined that petitioner was a member of the conspiracy (Tr. 771-778). Petitioner's somewhat contradictory claim, that the trial judge "forbade the jury to consider [the activities of] Roseboro or English" in determining whether a conspiracy existed between those two and petitioner (Pet. 8), is also without merit and is refuted by the very portions of the charge about which he complains (Pet. 10).

as the indictment charged a conspiracy from January 1970 to April 1971. But an indictment charging a conspiracy is not subject to dismissal when the proof establishes the existence of a conspiracy for a substantial portion of the period of time charged in the indictment. *United States* v. *Postma*, 242 F. 2d 488, 496 (C.A. 2), certiorari denied, 354 U.S. 922. Here, the proof showed a conspiracy between Roseboro and English to sell narcotics commencing in October, 1970, and lasting at least until the middle of December, with petitioner joining it no later than the beginning of December. In the absence of any claim of prejudice to petitioner's defense, the variance is immaterial. *United States* v. *Postma*, *supra*.[4] Furthermore, an indictment charging a conspiracy to transfer narcotics need not contain the name of the prospective purchaser. Particulars of that kind can be obtained through pre-trial discovery. The only case cited by petitioner, *Lauer* v. *United States*, 320 F. 2d 187 (C.A. 7), certiorari denied, 368 U.S. 818, was expressly overruled in *Collins* v. *Markley*, 346 F. 2d 230 (C.A. 7, *en banc*), certiorari denied, 382 U.S. 946. In any event, the substantive counts in the indictment contained the purchaser's name; accordingly petitioner was in no way surprised or prejudiced in his defense at trial.

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[4] Each of the overt acts charged in the indictment was alleged to have taken place in December, 1970. Petitioner's claim, that the trial judge permitted "the jury to consider conspiratorial conduct for a period of two months after the arrests took place * * * in * * * February 1971" (Pet. 15), is unencumbered by a reference to the record and is not otherwise explained.

3. Petitioner alleges that the government failed to prove that the conspirators contemplated dealing in narcotics other than pursuant to the required order form. The law is clear that if an agreement to distribute heroin exists at all, the fact that the transfers are made clandestinely justifies an inference that order forms are not demanded of the buyer. *United States* v. *Vasquez*, 429 F. 2d 615, 618-619 (C.A. 2); *United States* v. *Butler*, 446 F. 2d 975 (C.A. 10). The evidence in this case of guarded telephone conversations, utilization of code phrases, reference to police surveillance, and secretive movements and meetings resulting in delivery of large amounts of heroin in hotel rooms, clearly establish the illicit purpose and design of the conspiracy, and formed the basis for an inference that the order form requirement was ignored.

4. Petitioner's final claim, that the evidence failed to establish that petitioner was the same "Calvin" overheard on the wiretapped conversations, is also unpersuasive. It is well settled that voice identification may be proved other than by direct evidence. See, *e.g.*, *United States* v. *Fassoulis*, 445 F. 2d 13 (C.A. 2), certiorari denied, 404 U.S. 858, and cases cited therein. Here, the evidence of petitioner's meetings with Roseboro on the three occasions following "Calvin's" conversations with Roseboro clearly showed that petitioner Calvin Williams and "Calvin" were one and the same person. While petitioner's "expert" witness testified that he had substantial doubt that the voice on the tapes was that of petitioner, he ad-

mitted that his conclusion was based not upon any scientific process but simply on listening to the tapes (Tr. 581-89). The decision as to the weight to be given this testimony was for the jury. *United States* v. *Kelly*, 420 F. 2d 26, 28-29 (C.A. 2).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1972.

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